Nos. 111 - 112

(14)

IN THE

Supreme Court of the United States

MARY STEVENS BAIRD,
Petitioner,
v.
ARTHUR H. FRANKLIN, Treasurer of the New York Stock Exchange, an Unincorporated Association of More than Seven Persons,
Respondent.

THE NEW YORK YACHT CLUB,
Petitioner,
v.
ARTHUR H. FRANKLIN, Treasurer of the New York Stock Exchange, an Unincorporated Association of More than Seven Persons,
Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

WILLIAM DEAN EMBREE,
Counsel for Respondent,
15 Broad Street,
New York 5, N. Y.

MILBANK, TWEED & HOPE,
LAWRENCE BENNETT,
EDWARD N. PERKINS,
of Counsel.

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Opinions Below.

The opinions delivered in the court below are reported in 141 Fed. (2d) 238.

Statement.

These cases were tried by the Petitioners on the theory that, on November 24, 1937, certain facts became known to the respondent (New York Stock Exchange) amounting to notice that Richard Whitney was guilty of conduct requiring prompt action on the part of the Exchange to investigate and suspend or expel Whitney, and that the

failure to do so was a breach of duty owing to the petitioners since they had securities in the hands of Whitney which would or might be dealt with by him in such a way as to cause their loss. The record shows, indeed it was stipulated (Pltf.'s Ex. 4, R. 244, and Exhibit A, R. 250-253; Pltf.'s Ex. 14, R. 261-2 and Exhibit A, R. 267-273), that all of the petitioners' securities had been continuously pledged by Whitney as security for loans made to Whitney or his firm by various banks from a period long before November 24, 1937 until March 8 and 10, 1938 when, upon Whitney's suspension by the Exchange because of insolvency, the securities were sold on foreclosure to satisfy the bank loans. While during this period the securities were released at various times from pledge, it was in every instance for the purpose of pledging them with another bank for another collateral loan on the very same day, and it is obvious from the record that Whitney's possession of the securities was only transitory and merely a step in a shifting of the securities from one bank to another and that the securities were released from pledge at one bank only by the use of money borrowed for that purpose on the same day from another bank.

The Circuit Court of Appeals held that on November 24, 1937, the Exchange violated a duty when it failed to suspend or expel Whitney, "but to justify a judgment in favor of either plaintiff, such a breach of duty must have resulted in damage that can be traced to the breach."

The Circuit Court of Appeals then held that no cause of action had been established, because, as stated in the opinion of the Court:

> "We can see no likelihood that the expulsion or suspension of Richard Whitney when his conversions came to the notice of the officers of the Exchange on November 24, 1937, would have in the least benefited the plaintiffs for the securities were then all converted and in the hands of pledgees.
>
> * * * * *

"On the record the trial judge would not have been justified in any finding that the plaintiffs suffered damage and he in fact found to the contrary."

ARGUMENT

POINT I.

There is nothing in the decision below to move the Supreme Court to review it.

All that the Circuit Court of Appeals has done in this case is to apply the settled rule of law, that a breach of duty alone without resulting damage does not create a cause of action.

As stated by Judge Cardozo, speaking for the New York Court of Appeals, in *Martin* v. *Herzog,* 228 N. Y. 164, at page 170:

> "We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. * * * To say that conduct is negligence is not to say that it is always contributory negligence. 'Proof of negligence in the air, so to speak, will not do' (Pollock Torts [10th ed.], p. 472)."

Surely the reiteration of this established principle and its application in this case does not present any such question as is contemplated by Rule 38 of this Court.

POINT II.

The petitioners' contention with respect to Section 20(a) of the Securities Exchange Act of 1934 is too strained and far-fetched to be worthy of consideration.

The petitioners urge that their point based on Section 20(a) of the SEC Act of 1934 raises an important undecided

question of Federal law. But in reality their argument raises no genuine question, but only proposes a perversion of Section 20(a).

"Controlling person," as that expression is used in Section 20(a), means someone who exercises practical control of a person who, while under such control, injures another. Section 20(a) was designed to deal with the situation where, although the relation of principal and agent or other type of legal control is lacking, one person is made the means of wrongdoing while serving as a screen for another who is able to exercise a practical control, and it is appropriate that the true actor, the one behind the scenes, should be made jointly and severally liable with the ostensible actor.

One or two excerpts from the legislative history of this section are sufficient to show the unsoundness of the petitioners' contention.

At page 6571 (in Part 15) of the printed record of Hearings before the Committee on Banking and Currency, U. S. Senate 73rd Congress, Second Session relating to Stock Exchange practices, is the following explanation given by Mr. Thomas G. Corcoran, one of the drafters of the Act:

> "Without reading those paragraphs, the first is taken verbatim from the Securities Act. The purpose is to prevent evasion of the provisions of the section by organizing dummies who will undertake the actual things forbidden by the section."

In the House debate on the subject as reported in Volume 78, Part 8, of the Congressional Record, at page 8095, Mr. Lea of California explained the provision, in answer to questions, as follows:

> "The object of this provision is to catch the man who stands behind the scenes and controls the man who is in a nominal position of authority."

And again (*ibid.*) he stated:

> "It [the relationship] is just the same position as in the control of a dummy on a directorate. The man who stands behind the scenes and dominates the dummy ought to be responsible because he is the real party in interest."
>
> * * * * *
>
> "It is a question of proving the case in court on the basis of the facts to show that one man did control the other in doing a wrongful thing, and until you have done that there is no punishment or penalty."

Manifestly the members of The New York Stock Exchange are not "dummies" of the Exchange, nor are they persons "in a nominal position of authority" with the Stock Exchange standing behind the scenes and being "the real party in interest". Every member of the Stock Exchange is in business independently for himself and is always the real party in interest.

Petitioners say (p. 12) that "the Courts below did not expressly pass on petitioner's contention, that the respondent exchange was liable jointly and severally with Whitney and his firm, under Section 20(a) of the Act"; but petitioners do (p. 13) "reach the conclusion that the Circuit Court of Appeals must have decided that respondent did not 'control' Richard Whitney and Richard Whitney & Co. within the meaning of Section 20(a)." We agree that this conclusion is inescapable, for petitioners fully briefed their contention under Section 20(a) before the Circuit Court of Appeals, and that court rejected the contention when it held that "The cases were tried on the only possible theory on which recovery could have been hoped for," namely, under Section 6(a) and 6(b) of the Act. (141 F. [2d] 242.)

POINT III.

There is no conflict with any decision of this court or with any decision of any circuit court of appeals.

The petitioners claim that the decision below conflicts with *The Pennsylvania,* 19 Wall. 125 (cited at pp. 3, 16, 17, and 19 of the petition), with *H. W. Bass Drilling Co.* v. *Ray,* 101 Fed. (2d) 316 (cited at pp. 3, 15, and 19 of the petition), and with *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555 (cited at pp. 4 and 24 of the petition). Various other cases are cited, apparently to support the idea that there is a conflict, or as having some bearing on the merits.

The Pennsylvania was a case of collision in a fog at sea where the steamer involved was guilty of negligence, and it was a question whether the sailing vessel, which had negligently rung a bell while in motion instead of using a foghorn as she was required by law to do, had thereby contributed causally to the accident. The decision announced a rule of causality applied by the Federal courts sitting in admiralty with respect to violations of statutes designed to prevent accidents at sea (cf. *The Aakre,* 122 Fed. [2d] at pp. 474 and 476), and may not be thought of as having application outside of that field. Furthermore, the case stands for no more than that proof that the sailing vessel violated a rule of maritime law designed to prevent collisions at sea, established negligence on her part, shifting to her the burden of disproving the causal connection between such violation and the ensuing collision (cf., 122 Fed. [2d] at p. 474).

The *Bass Drilling Co.* case presented no question of Federal law. The only issue was the contributory negligence of the driver of a truck because of his violation of a New Mexico statute limiting the speed of trucks to 45 miles an hour. It was shown that the truck was traveling in excess of 45 miles an hour at night when it collided with defendant's truck parked in the

highway. Therefore, under the circumstances, there was a natural inference of a causal connection between the violation of the statute, which the Court held to be negligence *per se*, and the collision. The question before the Court was whether the jury had been properly instructed that violation of the statute was negligence *per se* and that the burden shifted to the plaintiff to disprove causal connection between the violation of the statute and the ensuing collision with the defendant's truck. In the present case there can be no inference of causal connection since it appears from the stipulated proof that the performance of the respondent's duty would only have resulted in their being sold on foreclosure shortly after November 24, 1937, instead of at the later time; and this was the reason why the Circuit Court of Appeals found that there was "no likelihood that the expulsion or suspension of Richard Whitney * * * would have in the least benefited the plaintiffs". The *Bass Drilling Co.* case presents no fact comparable to the affirmative proof in the present case that the securities had been converted and pledged for bank loans from a time long before November 24, 1937, and would only have been foreclosed and sold sooner instead of later if the alleged duty had been performed.

The *Story Parchment Co.* case was an action for damage claimed to have resulted to the plaintiff from a conspiracy in restraint of trade to drive down prices. The damages were to be measured by the difference between the prices received by the plaintiff during the period concerned and the prices it would have received had prices not been driven down. The defendant's action in driving down prices had made it impossible to demonstrate what the prices would otherwise have been. The fact of whether damage to the plaintiff had been caused was not in the least in doubt, and the alleged failure of proof as to damages related exclusively to the difficulty of assessing the amount of the damages.

POINT IV.

The petitions for writs of certiorari should be denied.

Respectfully submitted,

William Dean Embree,
Counsel for Respondent,
15 Broad Street,
New York 5, N. Y.

Milbank, Tweed & Hope,
Lawrence Bennett,
Edward N. Perkins,
of Counsel